

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 77-6219

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6219

MARSHALL P. SAFIR,
v. *Plaintiff-Appellant,*
ROBERT J. BLACKWELL, ASSISTANT SECRETARY OF COMMERCE, *et al.,*
Defendants-Appellees.

No. 77-7626

MARSHALL P. SAFIR,
v. *Plaintiff-Appellant,*
AMERICAN EXPORT LINES, INC., *et al.,*
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLEES
NON-TRADE LINE STEAMSHIP COMPANIES
AMERICAN PRESIDENT LINES, LTD., FARRELL LINES, INC.,
PRUDENTIAL LINES, INC., AND PSS STEAMSHIP COMPANY, INC.

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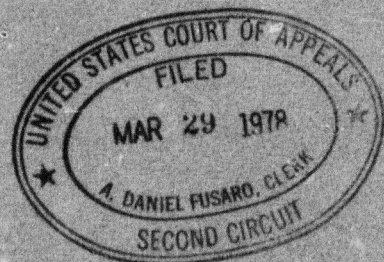


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In The
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For The Second Circuit

No. 77-6219

Marshall P. Safir,
Plaintiff-Appellant,

v.

Robert J. Blackwell, Assistant,
Secretary of Commerce, et al.,
Defendants-Appellees,

No. 77-7626

Marshall P. Safir,
Plaintiff-Appellant,

v.

American Export Lines, Inc., et al.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES
NON-TRADE LINE STEAMSHIP COMPANIES
AMERICAN PRESIDENT LINES, LTD., FARRELL LINES, INC.,
PRUDENTIAL LINES, INC., AND PSS STEAMSHIP COMPANY, INC.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion in denying Mr. Safir's motion to amend his 1968 complaint seeking to enforce Section 810 of the Merchant Marine Act, 1936, in E.D.N.Y. No. 68-C-643, where amendment was sought more than nine years after the original complaint was filed and more than seven years after the case was closed and undertook to state a wholly new claim

under a different statute, namely the False Claims Act.

2. Whether the District Court properly dismissed an action filed by Mr. Safir in May, 1977 charging violation of the False Claims Act, E.D.N.Y. No. 77-C-1093, on the ground that all information relevant to Mr. Safir's False Claims Act action was in the possession of the United States at the time the action was filed.

3. Whether the six year statute of limitation of the False Claims Act bars Mr. Safir's May, 1977 action, E.D.N.Y. No. 77-C 1093, insofar as it charges a violation of the Act by the non-trade lines (American President Lines, Ltd., Farrell Lines, Inc., Prudential Lines, Inc., and PSS Steamship Company, Inc.).

4. Whether the non-trade lines can be found to have violated the False Claim Act by claiming and receiving subsidy pursuant to their operating-differential subsidy contracts where (a) at all stages of the administrative litigation before the Maritime Subsidy Board and the Secretary of Commerce under Section 810 of the Merchant Marine Act, 1936 those lines were determined entitled to receive the full subsidy due under their contracts, and (b) where at all times the subsidy claims were made and paid the Maritime Subsidy Board was on full notice of all facts relevant to the charge that the lines had violated Section 810.

STATEMENT OF THE CASE

1. Prior Proceedings. In June, 1968 the appellant, Mr. Marshall Safir, filed an action in the United States District Court for the Eastern District of New York (hereinafter "Eastern District" or "District Court") naming the Acting Maritime Administrator, the

Secretary of the Maritime Subsidy Board, and the Secretary of Commerce ("Secretary") as defendants. The complaint, reciting that it was based on Section 810 of the Merchant Marine Act, 1936, 46 U.S.C. §1227, sought an order prohibiting the defendants from continuing maritime subsidy payments to named operating-differential subsidy contractors and requiring that certain subsidies paid to those contractors in the past be recovered from them. Safir v. Gulick, E.D.N.Y. Civil No. 68-C-643. The subsidized lines were not made defendants in the action.

During the following two years the issues raised in the complaint were extensively litigated in the Eastern District and in this Court. Throughout that litigation it was Mr. Safir's position that Section 810 created an absolute bar to the payment of any subsidy to the operators. In a series of decisions this Court: ruled that Mr. Safir has standing to require the Secretary of Commerce (and his delegatee the Maritime Subsidy Board) to investigate Mr. Safir's charges that §810 had been violated by the operators; ruled that the Secretary had some but not unlimited discretion in invoking penalties under Section 810; and held an earlier determination of the Federal Maritime Commission that ocean freight rates charged by certain of the operators were "unjustly discriminatory and unfair" to be res judicata in the investigation under Section 810. Safir v. Gibson, 417 F.2d 972 (1969), 432 F.2d 137 (1970).

Following this Court's decisions the Maritime Subsidy Board (hereinafter "Board") did conduct an investigation of the claimed violations of Section 810, in MSB Docket S-243, Investigation of Alleged Section 810 Violation. In 1973 the Board issued

a final opinion and order requiring the repayment of defined amounts of subsidy by certain of the operators (the "trade" lines), but not from the operators (the "non-trade" lines) which had not participated in the rate reductions found unjustly discriminatory and unfair. Investigation of Alleged Section 810 Violation, 13 SRR 809, 14 SRR 77 (MSB, 1973).^{1/} On September 4, 1974 the Secretary of Commerce affirmed the Board, except that he reduced by about one-half the subsidy repayment required to be made by the trade lines. [A 379-380]

On five separate occasions during the pendency of Docket S-243 Mr. Safir moved either in the Eastern District, directly in this Court, or in the United States District Court for the District of Columbia for interlocutory relief pending completion of the Board proceedings or for interlocutory review of Board action taken in the course of the proceedings.^{2/} Following the Secretary's September, 1974 decision Mr. Safir sought review of that decision in the United States District Court for the District of Columbia, on

1/ Maritime Subsidy Board decisions which are not yet officially reported are cited by reference to Pike & Fisher Shipping Regulation Reporter, as follows "____ SRR ____"

The reference "A ____" is to the page of the Appendix to plaintiff's brief in No. 77-6219 and the Joint Appendix in No. 77-7626, which are paginated consecutively.

The reference "NTA ____" is to the page of the Appendix accompanying this brief of the non-trade lines.

2/ See NTA 12.

grounds (a) that Section 810 makes it mandatory that the Secretary recover all subsidies paid to the operators for the period of the violation and (b) that in any event the Secretary had abused his discretion in assessing the amount of subsidy to be recovered. Mr. Safir's primary claim on review -- that Section 810 creates an absolute non-mitigatable penalty -- was rejected by the District Court [A 284], and that holding was affirmed by the United States Court of Appeals for the District of Columbia Circuit (hereinafter D.C. Circuit). Safir v. Kreps, 551 F.2d 447 (1977), cert. denied. 46 U.S. L.W. 3215 (Oct. 31, 1977). The case is now pending before the District Court for determination of the alternative issue, viz. whether the Secretary properly exercised his discretion in assessing the subsidy refunds required from various lines.

The pending dispute has now been at issue, in one context or another, for more than twelve years. One or another aspect of this litigation has been passed on by the Federal Maritime Commission, the Maritime Subsidy Board/Secretary of Commerce, the Eastern District (on at least six separate occasions), this Court (on at least five separate occasions), the United States District Court for the District of Columbia (in two separate law suits), the United States Court of Appeals for the District of Columbia Circuit (on two occasions), and the dispute has been before the United States Supreme Court on writ of certiorari three times. For reference purposes a detailed history of the litigation is given in the Appendix to this brief.

2. The Pending Appeals. In the actions now before this

Court Mr. Safir has proposed to start the litigation afresh by motion to amend his original, decade-old complaint in the Eastern District (68-C-643) to state a wholly new claim under a wholly new statute -- the False Claims Act, 31 U.S.C. §231 -- and by filing a new action in the Eastern District (77-C-1093) advancing the very same False Claims Act violations which are charged in the proposed amendment to the 1968 complaint. The District Court, in an order entered December 20, 1977, denied Mr. Safir's motion to amend the 1968 complaint [A 1, 8-13], and that decision is the subject of Mr. Safir's appeal in No. 77-6219. The District Court concurrently dismissed Mr. Safir's complaint in E.D.N.Y. 77-C-1093 by reference to the provisions of 31 U.S.C. §232(C) which states that the "court shall have no jurisdiction to proceed" in an action under the False Claims Act being prosecuted by a private individual "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States * * * at the time suit was brought * * *." The District Court found that all relevant information underlying the claim stated by Mr. Safir in the complaint in E.D.N.Y. 77-C-1093 was in the possession of the United States at the time the complaint was filed. [A 1, 13-21] This latter holding is the subject of the appeal in No. 77-7626.

3. The Brief. This brief is filed on behalf of the "non-trade" lines--American President Lines, Ltd., Farrell Lines, Inc., Prudential Lines, Inc., and PSS Steamship Company.^{3/} In all

3/ In prior proceedings in this prolonged litigation, Prudential Lines, Inc., was identified by its earlier corporate names Prudential Grace Lines, Inc., and Grace Line, Inc., while PSS Steamship Company, Inc., was identified by its earlier corporate names Prudential Steamship Company, Inc., and Prudential Lines, Inc.

administrative determinations under §810 of the Merchant Marine Act, 1936, the statutory base of Mr. Safir's prior law suits, the non-trade lines were found not to have agreed or conformed to the reduced ocean freight rates determined unlawful under §810, and it was accordingly determined that no recovery of subsidy would be required of them under that provision of the statute or its analogue in the lines' operating-differential subsidy contracts. Plaintiff, in his complaint in E.D.N.Y. 77 Civ. 1093 and in his proposed amended complaint in E.D.N.Y. 68 Civ. 643, nevertheless claims that the non-trade lines--as well as the trade lines, which were found to have engaged in the unlawful rate reductions--should be required to pay the Government twice the subsidy received by them for the 11-month period during which the reduced rates were in effect, on the newly advanced claim that the lines in claiming their subsidies defrauded the Government in violation of the False Claims Act. The recovery so sought by Mr. Safir is estimated in his proposed amended complaint as about one-half billion dollars. [A 43, 38, 59-60]

While the claim stated by Mr. Safir in his proposed amended complaint in E.D.N.Y. 68-C-643 and in his newly filed complaint E.D.N.Y. 77-C-1093 is new, the facts upon which the claim is to be judged have been extensively litigated over a period of a decade, are fully known, and are beyond dispute. The balance of this brief we show that the District Court was correct: (a) in refusing to permit Mr. Safir to amend his 1968 action more than nine years after the complaint was originally filed, and more than seven years after the case was closed, to assert a new cause of ac-

tion under a different statute against different parties than were named in the original complaint, and (b) in holding that all information relevant to the claim stated by Mr. Safir in his newly filed complaint in E.D.N.Y. 77-C-1093 was in the possession of the United States at the time the complaint was filed. We show as well that there are additional grounds compelling the action taken by the District Court in refusing amendment of the 1968 complaint and in dismissing the 1977 complaint as to the non-trade lines, namely: (c) that the claim asserted in E.D.N.Y. 77-C-1093 is barred by limitations, and (d) that the asserted violations of the False Claims Act by the non-trade lines can be shown on the undisputed facts of record to be wholly without merit. While the District Court did not find it necessary to rule on these latter two defenses in light of its action dismissing Mr. Safir's claims on other grounds, each was argued to the District Court and provides additional support for the judgment below.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN DENYING AMENDMENT OF
THE 1968 COMPLAINT

Mr. Safir's original complaint was filed in District Court on June 24, 1968. It stated a claim under Section 810 of the 1936 Act. [A 62,68] After extensive litigation in the District Court and this Court the District Court on September 17, 1970 issued its judgment, implementing the mandate of this Court. [A 120] Mr. Safir concedes in his affidavit in support of his motion to amend the complaint that his original complaint as filed in 1968 stated no claim under the False Claims Act. [A 35, 39] If it had there

obviously would have been no occasion for Mr. Safir, in May, 1977, to have filed a wholly new action stating a claim under the False Claims Act, or in September, 1977 to have moved to amend his 1968 complaint to add such a claim. Mr. Safir nevertheless argues that his 1968 complaint may in 1977 appropriately be amended to add the False Claims Act claim, and that such a claim should relate back to the filing date of the original complaint. In support of this result he argues: that all parties to this litigation have been on notice of his intention to proceed under the False Claims Act; and that the False Claims Act claim currently being advanced is indistinguishable from the Section 810 claim previously advanced in this litigation. [Safir Brief No. 77-6219, pp. 5 et seq.]

The District Court refused Mr. Safir's application for amendment, reasoning that his proposed amended complaint would add a new claim long after the basic case had been terminated. This decision to refuse amendment is reserved to the discretion of the trial court, and is subject to appellate court reversal only when a clear abuse of discretion can be established. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); Izaak Walton League of America v. St. Clair, 497 F.2d 849, 854 (8th Cir., 1974), cert. denied. 419 U.S. 1009 (1974). Here there was no such abuse, but to the contrary, as we now show, the decision to refuse amendment was quite obviously correct.

A. Undue Delay and Prejudice.

Rule 15(a) provides that once a complaint has been answered, it may be amended "only by leave of court or by written consent of the adverse party; and leave shall be freely given when

justice so requires * * *." In Foman v. Davis, 371 U.S. 178 (1962), the Supreme Court emphasized that a liberal gloss was to be placed upon this rule. The Court also noted, however, that denial of an amendment is appropriate in circumstances involving "undue delay" or "undue prejudice to the opposing party by virtue of allowance of the amendment." Id. at 182. Courts have generally found "undue delay" or "undue prejudice" or both when the amendment is proposed after the court has ruled on the merits of the pending action.^{4/}

For example, in Freeman v. Continental Gin Co., 381 F.2d

4/ Many courts, moreover, have denied leave to amend on the basis of undue delay prior to the resolution of the merits. For example, in Izaak Walton League of America v. St. Clair, 497 F.2d 849 (8th Cir. 1974), a motion to amend a complaint 17 months after it was initially filed, but before resolution of the merits, was held to have been properly denied, because the amendment "injected new issues [and] would have required extensive preparation [by defendant] to the detriment of a speedy resolution of the case." Id. at 854. And, in Portsmouth Baseball Corp. v. Frick, 21 F.R.D. 318, 320 (S.D.N.Y. 1958), an amendment to the complaint was denied prior to a trial on the ground that the introduction of a new theory of relief after the completion of discovery would be "in derogation of [defendant's] right to a just, inexpensive and speedy" resolution of the case. Many other courts have ruled that it is prejudicial to allow a complaint to be amended after the close of discovery. See, e.g., Mercantile Trust Co. v. Inland Marine Products Corp., 22 F.R. Serv. 2d 434 (8th Cir. 1976); Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42, 44-46 (S.D.N.Y. 1972); Leighton v. One William Street Fund, Inc., 12 F.R. Serv. 2d 192 (S.D.N.Y. 1968).

Also of importance is the Supreme Court's decision in Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321 (1971), where the Court held that the denial of a motion to amend an answer after a judge had issued findings of fact and conclusions of law was proper because a ruling to the contrary "would, of course, have required reopening of the record" Id. at 330-331.

These cases suggest that Mr. Safir's motion for leave to amend his complaint might well have been denied long before District Court entered its September 1970 judgment.

459 (5th Cir. 1967), the defendant attempted to amend his answer nine months after the plaintiff's motion for summary judgment had been granted but before a final judgment had been entered. The District Court denied leave and the Fifth Circuit affirmed, ruling:

"A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim. Liberality in amendment is important to assure a party a fair opportunity to present his claims and defenses, but 'equal attention should be given to the proposition that there must be an end finally to a particular litigation.' . . . " Id. at 469.

In Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973), a summary judgment against the plaintiff was sustained upon appeal, but a judgment against the defendant on a counterclaim was reversed and remanded. Upon remand, the plaintiff unsuccessfully sought to amend his complaint. The Sixth Circuit affirmed saying:

"[A] trial court is required to take into account any prejudice that the party opposing the motion to amend would suffer. Here the prejudice to Schwinn is obvious. The case has been pending for more than two and one-half years, and Schwinn already has had to defend against one theory at both the district court and the appellate court levels. The District Court would have been justified in concluding that to put Schwinn through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial The time has come to bring this extended litigation to an end." Id. at 971.

The judgment in Mr. Safir's 1968 action was entered in September, 1970. [A 120] In result of that judgment the alleged violations of Section 810 have been extensively and fully litigated before the responsible administrative agencies and, based on Mr.

Safir's own election to seek review of the resulting administrative decisions in the United States courts in the District of Columbia, have been extensively litigated in and are currently pending before those courts. Mr. Safir claims that at least since 1972 the parties have been on notice of his intention to press additional claims under the False Claims Act.^{5/} The simple fact is, however, that during the half-decade which has passed since that claimed notice Mr. Safir has not sought a judicial determination of the False Claims Act claim. He has chosen instead to delay the assertion of such a claim -- whether by new complaint or amendment of his existing complaint in the District Court -- until the issues under Section 810 had been fully litigated and decided.^{6/} This unnecessary delay, in and of itself, fully justified the District Court's refusal to permit amendment.

Mr. Safir has for the last decade engaged in nothing more than seriatim actions designed to require the United States to collect all subsidies paid to the trade and non-trade lines for the critical 1965-66 period. Upon failing to obtain such broad re-

5/ "At all times during S.243 and since 1972 in an action to escrow the proceeds of ship sales in this Docket 68-C-643 all defendants knew that plaintiff Safir intended to exercise his rights under 31 U.S.C. 231 et seq. [i.e., the False Claims Act], if the Secretary of Commerce sought recovery in an amount less than demanded in the original complaint herein." Amended Complaint ¶ 25, A 43, 52.

6/ Mr. Safir was represented by counsel when his original complaint in 68C-643 was filed and during the extended period of litigation leading to the September 17, 1970 judgment therein. The result would be no different even if he had not been. Misconception of the law has never been accepted as an excuse for the late presentation of an alternative theory of recovery through an amended complaint even if the movant is litigating pro se. Goss v. Revlon, Inc., 22 F.R. Serv. 2d 440, 441 (2d Cir. 1976). See also Troxel Mfg. Co. v. Schwinn Bicycle Co., 439 F.2d 968, 971 (6th Cir. 1973); 3 Moore's Federal Practice ¶ 15.08 [4] at 897-900 (1974).

lief under §810 in two separate circuits (i.e., here and in the District of Columbia), the Supreme Court, and the Maritime Subsidy Board, Mr. Safir has returned to the Eastern District once again asserting a wholly new legal theory. This litigation, like that in Freeman and Troxel, should be brought "to an end."

B. The Amended Complaint States A Wholly Different Claim.

The claim Mr. Safir seeks to bring by way of an amendment is the same claim he has asserted in his new complaint at E.D.N.Y. 77-C-1093. The attempt to amend, accordingly, may be seen simply as an effort to avoid the limitations bar (and the other statutory bar)^{7/} to a new False Claims Act suit at this time. In proceeding by amendment to his 1968 complaint, Mr. Safir candidly admits (see Affidavit in Support of motion to amend, A 35, 38-42) that it is his intention to gain the advantage of Rule 15(c) which provides that an amendment will "relate back" to the date of the original filing "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading * * *" Absent a "relation back" there obviously would be no occasion for the False Claims Act dispute to be litigated through the vehicle of Mr. Safir's long closed 1968 action -- assuming, as there is not, that there were something appropriate to litigate -- since the same claim stated in the proposed amended complaint could be, and in Mr. Safir's May, 1977 complaint in E.D.N.Y. 77-C-1093 in

^{7/} See pp. 19 et seq., infra.

E.D.N.Y. 77-C-1093 in fact has been, stated in a newly filed action. Amendment was appropriately denied, accordingly, if -- as we now demonstrate -- Mr. Safir's amendment could not under Rule 15(c) relate back to the original complaint.

The issue, simply stated, is whether the proposed amended complaint states the same or a different claim from that of the original complaint. By way of example Professors James and Hazard have reviewed the important Rule 15(c) cases and have concluded that an amendment which alleges a new cause of action cannot be said to have arisen out of the same conduct pled in the original complaint. In this regard, they have said:

"If the amendment essentially corrects or amplifies the claim originally presented, it is always treated as relating back to the date the action was commenced But, if the amendment introduces a substantially new claim, the amendment can be regarded as, in effect, a new lawsuit and therefore barred if the statute of limitations governing that claim has expired." James and Hazard, Civil Procedure §5.7 at 164-165. (Emphasis added.)

Professor Moore states the rules differently but reaches essentially the same conclusion:

"[W]hile it is still the rule that an amendment which states an entirely new claim for relief based on different facts will not relate back, if the pleading sufficiently indicates the transaction or occurrence on which the claim or defense is based, amendments correcting specific factual details, such as time and place, as well as other items will relate back." 3 Moore's Federal Practice ¶ 15.15 [3], pp. 1026-27 (and cases cited therein).

Mr. Safir's argues that the False Claims Act violation alleged in the proposed amended complaint and the Section 810 violation alleged in his 1968 complaint represent a single, integrated claim. It is clear from an examination of the two com-

plaints, however, that the argument will not wash:

(a) Mr. Safir's original 1968 complaint dealt solely with an alleged violation of §810. Paragraph First of that complaint thus alleged "[t]his action arises and this Court has jurisdiction by virtue of the following statutes," naming, in addition to the Administrative Procedure Act and relevant procedural provisions of the Judicial Code, only Section 810 of the 1936 Act. [A 62-63] The proposed amended complaint, on the other hand, includes within it new allegations of wrongdoing under an entirely new statute, the False Claims Act, which in the proposed amended complaint is added to the statutes listed in paragraph First.

[A 43-44]

(b) The only named defendants in the original complaint were United States officials. [Original Complaint, ¶¶ 5-7; A 62-64] In the proposed amended complaint the United States is joined as a plaintiff and the principal defendants are not government officials (nor could they be since actions under the False Claims Act are brought in the government's behalf), but individual ocean carriers. [Amended Complaint, ¶6; 43-45]

(c) The wrongful conduct that was the subject of the original complaint was an alleged conspiracy by members of AGAFBO to reduce rates so as to injure Sapphire Lines. [Original Complaint ¶11; A 62-65] The complaint charged this violation in eighteen numbered paragraphs. The conduct complained of in the proposed amended complaint is not only a conspiracy to reduce rates, but also the lines' submission of certain verified vouchers and accounting statements that, it is alleged, improperly averred that the subsidy contracts,

which include a requirement similar to Section 810, were being satisfied. [Amended Complaint, ¶¶ 31-37; A 43, 54-58] The proposed amended complaint, in charging these new and different violations, extends to thirty-seven numbered paragraphs.

(d) The relief requested in the original complaint was an order to the Secretary requiring literal enforcement of the provisions of Section 810 -- the prohibition of future subsidy payments to the AGAFBO lines and the recovery of subsidy paid to the lines in the past. [A 62-68] The False Claims Act relief requested in the amended complaint is wholly different: the return of double the amount of subsidies received from the United States, the payment of a \$2000 penalty for the submission of each false claim, and a determination of default by the operators under their operating-subsidy contracts. [A 43, 58-60]

(e) Finally, the False Claims Act requires that when any private person initiates an action under that statute "notice of the pendency of such suit shall be given to the United States" which is to include "a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." 31 U.S.C. §232(C) No such notice of pendency was given to the United States at the time of the filing of the original suit or, indeed, until May, 1977 when Mr. Safir filed his complaint in E.D.N.Y. 77-C-1093. Mr. Safir relies on this May 26, 1977 notice of pendency, filed with respect to his com-

plaint in E.D.N.Y. 77-C-1093, as support for the proposed amended complaint in 68-C-643.^{8/}

By any standard, the new complaint introduces, in Professors James', Hazard's and Moore's terms, "substantially new claim[s]" never "indicated" by the original complaint.

Indeed, the fact that the original complaint never suggested the amended one is further demonstrated by the history of this case. Mr. Safir has asserted in his proposed amended complaint [¶ 25; A 43-52] that he had made both the Government and the carriers aware, by at least as early as 1972, that he had a False Claims Act remedy available to him. Even if effective notice of a False Claims Act remedy had been given, as Mr. Safir thus alleges, it will be seen that the date on which he asserts the notice was given -- 1972 -- came four years after the filing of his complaint and two years after the entry of the District Court judgment. But, contrary to his claim, even in 1972 there was neither effective notice by Mr. Safir of an asserted False Claims Act right, nor any indication that he considered that right to arise from the 1968 action

8/ "On May 26, 1977, I filed a complaint and affidavit in this Court (77-Civ. 1093) which asserted a claim against the defendant shippers under the False Claims Act (31 U.S.C., 231 et seq). This action was filed to foreclose technical statute of limitations defenses and plaintiff informed the Court that before or soon after the resolution of certain issues related thereto in the Supreme Court of the United States, that this amended complaint would be filed. The proposed amended complaint incorporates this asserted claim. A notice of pendency was accordingly sent to the Attorney General, who in June of this year declined to enter an appearance herein, waiving the Government's rights to prosecute under 31 U.S.C. Section 232(C)." September 13, 1977 Affidavit in Support of motion to amend, pp. 7-8; A 35, 41-42.

rather than from a subsequent and independent suit.^{9/} Instead, the confusion created by Mr. Safir's general and unfocused allegations about qui tam legislation is evidenced a by-passage in the District Court's June 6, 1972 order:

"Plaintiff argues that he may have an individual right to participate in any ultimate recovery by the Government under qui tam legislation. No statute authorizing a qui tam recovery or qui tam proceedings has been pointed to and the decision in Connecticut Action Now, Inc. v. Roberts [457 F.2d 81 (2d Cir. 1972)], makes it reasonably clear the the plaintiff has no qui tam interest in the Government's recovery under Section 810"10/

And there are similar statements expressing confusion over Mr. Safir's qui tam allegations in the Initial Decision of the Chief Administrative Law Judge in MSB Docket S-243 issued on April 24, 1972, 12 SRR at 1155-57, and in the final opinion and order of the Board issued on April 6, 1973, 13 SRR at 848-49.

This Court has made it clear that the general Rule 15(c) requirements are not to be relaxed for pro se plaintiffs. For example, in Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973), a com-

9/ See, e.g., a May, 1972 Affidavit which Mr. Safir filed in this Court in support of an application for a temporary restraining order (which was not granted) to require the escrowing of the proceeds of the sale of certain vessels of carriers involved in this litigation. Mr. Safir there makes reference to "the rights of this plaintiff in other actions he may take for a share of the Government's recovery. Through [sic] "Qui Tam" or other remedies in the law." Docket 72-1753, Affidavit of May 18, 1972, p. 3; emphasis supplied.

10/ When Mr. Safir later complained of this statement on appeal this Court found the statement "unnecessary to the decision and we have no occasion either to approve or disapprove it." Safir v. Blackwell, 469 F.2d. 1061, 1063 (2nd. Cir. 1972).

plaint filed by a pro se plaintiff claimed, pursuant to 42 U.S.C. §1983, that the police had violated his right to fair trial by commenting on the plaintiff's arrest to television reporters at the time of the arrest. The amended complaint alleged that at the time of arrest plaintiff was also assaulted by the officers. The statute of limitations had run on the assault charge. The amended complaint was found by the district court to relate back to the original complaint. Judge Friendly, writing for this Court, reversed, ruling:

"If the test were merely temporal, the assault claim would fall within Rule 15(c), since the alleged assault came within a short time after the exhibition before the television cameras. However, the test is not contemporaneity but rather adequacy of notice. As said by Judge Laramore in Snoqualmie Tribe v. United States, 372 F.2d 951, 960, 178 Ct. Cl. 570 (1967), 'the inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading.' Under that test the case for relation back conspicuously fails. On the most liberal reading not a word in the complaint even suggested a claim of physical assault." Id. at 526.

That analysis has equal application here.

II. THE DISTRICT COURT CORRECTLY FOUND THAT IT LACKS JURISDICTION OF THE ACTION IN E.D.N.Y. 77-C-1093 BECAUSE ALL INFORMATION RELEVANT TO THE SUIT WAS ALREADY IN THE POSSESSION OF THE UNITED STATES

The jurisdiction of federal district courts to entertain an action under the False Claims Act when prosecuted by a private litigant is governed by the terms of 31 U.S.C. §232(c), which provides that:

"The court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."

In construing this provision the courts have made clear that they are without authority to entertain a private action under the statute where it is shown that the United States, at the time the private complaint was filed, was in possession of the "essential" and "material" information disclosing the existence or nature of the fraud charged in the suit. Thus in United States ex rel. Greenberg v. Burmah Oil Co., 558 F.2d 43, 46 n.2 (2d Cir.) cert. denied, 98 S. Ct. 511 (1977), the relator produced three documents which were not in the possession of the Government, but this Court affirmed dismissal of the action on the basis that "the government already was in possession of a document containing whatever information of value these documents might arguably provide." Similarly, dismissing the complaint in United States ex rel. McLaughlin v. American Chain & Cable Co., 62 F.Supp. 302, 303 (S.D.N.Y. 1945), the court reasoned that although "the relator . . . asserts that he furnished at least some information to the Department of Justice which it did not previously possess, it is abundantly clear that all the material information for the suit was elicited by the Government, before the relator filed suit."

There can be no dispute in the present action as to the precise information which was in the possession of the United States at the time Mr. Safir filed his complaint in E.D.N.Y. 77-C-1093,^{11/}

^{11/} Even at the time he filed his original complaint in 1968, E.D. N.Y. 68-C-643, all information relevant to any False Claims Act charge was available to the United States. This point was fully demonstrated in our October 18, 1977 memorandum to the District Court in opposition to Mr. Safir's motion to amend.

for that subject is specifically addressed in the complaint itself, which shows on its face that all relevant information pertinent to Mr. Safir's claim was in the possession of the United States at the time he filed his complaint.

Paragraph VI of the E.D.N.Y. 77-C-1093 complaint thus alleges that [A 162, 166-67]:

"The issues involved in the complaint herein are now before the United States Supreme Court in Docket 76-1505, a copy of which is enclosed as Attachment A."

Elsewhere in the complaint it is asserted that [Id. at 164]:

"The history of the case from 1968 to 1977 is spelled out in detail in Attachments A and B."

In his May 26, 1977 notice of pendency to the Attorney General, served concurrently with the filing of the complaint, as required by the statute, Mr. Safir advised [A 170]:

"Enclosed herewith in accordance with Title 31 U.S.C. Sec. 232(c) is a copy of the complaint with Attachments A and B comprising substantially all of the pertinent evidence and information material to the effective prosecution of this suit."

Further, in his deposition in this action taken on September 28, 1977 [see A 194, 214-15], Mr. Safir specifically reaffirmed the allegations of his complaint to the effect that all the information which forms the basis of this action is contained in the two lettered appendices which were filed with the complaint in that action.^{12/} The referenced appendices, which were filed in District

^{12/} Mr. Safir at the deposition, in addition, sketched a fanciful, alternative theory for a False Claims Act claim, which we discuss in text below, *infra* pp. 24 et seq.

Court as exhibits to the complaint in E.D.N.Y. 77-C-1093, constitute Mr. Safir's petition to the United States Supreme Court for a writ of certiorari in Safir v. Kreps, No. 76-1505 (Mr. Safir's action seeking reversal of the Maritime Subsidy Board decision under Section 810) [Appendix A], and the appendix to the petition [Appendix B] which in itself consists almost exclusively of prior filings and decisions in this prolonged series of litigation.

Mr. Safir's petition for a writ of certiorari was dated and filed in the Supreme Court on April 26, 1977, and was concurrently served on the Department of Justice. That was one month before Mr. Safir filed his complaint in E.D.N.Y. 77-C-1093. The Safir complaint itself thus conclusively demonstrates the United States' prior possession of all relevant information pertaining to the suit and, correspondingly, the lack of jurisdiction of the District Court to entertain the action.

It was on this ground -- as well as by a detailed review of the decade of litigation in this dispute, in which the Government at all stages was deeply involved and which provides independent verification of the full prior public disclosure of all information relevant to Mr. Safir's action -- that the District Court determined that it lacked jurisdiction to proceed in E.D.N.Y. 77-C-1093.

Mr. Safir does not contest the reasoning of the Dis-

trict Court, but advances what appear to be two^{13/} alternative arguments in claiming that the District Court was nevertheless wrong. We need address these arguments only briefly.

1. Burden of Proof. Mr. Safir first argues [Brief, No. 77-7626, p. 5 et seq.] that the District Court wrongly imposed on him the burden "to negative knowledge" on the part of the Government. It seems to be Mr. Safir's position that a district court will not lose jurisdiction in a private action under the False Claims Act absent a formal statement by the Attorney General that the United States is in possession of all relevant information. Neither the statute nor the cases cited by Mr. Safir remotely support this. To the contrary, the statute unequivocally bars district court jurisdiction "whenever it shall be made to appear" that the relevant information is available to the United States.

The present dispute has been at issue since 1965. As the District Court explained [A 128, *passim*; see too NTA, *passim*] every aspect of the dispute has been publicly disclosed in quite literally mountains of papers filed over the years before Congressional committees, in two federal administrative agencies in federal courts of two judicial circuits, and in the United

^{13/} Mr. Safir does not press an argument he earlier made to the District Court that the jurisdictional bar does not apply when suit is pressed by a plaintiff who provided the information to the United States. As the District Court's opinion so clearly indicates [A 128, 143-47], such an interpretation is inconsistent with the language of the statute, its demonstrable purpose, and all relevant precedent.

States Supreme Court. These disclosures would themselves have disposed of the issue even if Mr. Safir had not -- as he has -- demonstrated the District Court's lack of jurisdiction by his own judicial admissions.

2. The Discovery Requests. Mr. Safir alternatively argues [Brief, No. 77-7626, p. 9 et seq.] that the complaint in E.D. N.Y. 77-C-1093 should not have been dismissed before he had been given the opportunity to pursue discovery. The issue of discovery was raised by Mr. Safir with the District Court for the first time during the course of oral argument on the motions to dismiss and for summary judgment. There Mr. Safir indicated an extensive list of materials for discovery, including White House tapes and the records of phone calls originating at the White House.^{14/} The reasons underlying his request were explained by him at length in an earlier deposition taken in the action on September 28, 1977 wherein he stated the following: that some time during October 1973 he

^{14/} See A 251, 288 et seq.

Mr. Safir currently has pending before the United States District Court for the District of Columbia, in an action now in that court, Safir v. Kreps, D.C.D.C. No. 74-1474, a motion for discovery of all White House tapes for the period January 3, 1969 through the date of former President Nixon's resignation.

received a telephone call from Louis Kohlmeyer (a journalist once employed by the Wall Street Journal but then working for the Chicago Sun Times), who asked him whether he had ever heard anything about a \$7 million payment allegedly made to former President Nixon by Spyros Skouras, Senior, in consideration of the President's agreement to select Spiro T. Agnew as his running mate in the 1968 elections, to settle an anti-trust action brought by the trustee in bankruptcy of Sapphire Steamship Lines, and to impede plaintiff in the pursuit of his claims regarding recovery of subsidy [A 194, 199-200, 226-27, 231, 236-38]. Mr. Safir stated that he understood Kohlmeyer's inquiry to have been prompted by a "leak" of information from either the Watergate Special Prosecutor's Office or from the Senate Select Committee on Presidential Campaign Activities (the "Ervin" Committee) [Id. at 232]. Mr. Safir also stated that Kohlmeyer mentioned, in relation to the rumor, the coincidence that Agnew, Andrew Gibson (whom the former President appointed the Administrator of the Maritime Administration), and Helen D. Bentley (whom the former President appointed the Chairman of the Federal Maritime Commission) all came from Baltimore, Maryland [Id. at 230-31, 235].

Mr. Safir stated at the deposition that he told Kohlmeyer that he had never heard of any such alleged payment to the former President. He also stated that he found the suggestion that such a payment may have occurred "improbable" and "bizarre" [Id. at 234].

Mr. Safir took no notes on the telephone conversation [Id. at 213-14], nor did he make any effort to verify Kohlmeier's suspicions. Several months later, according to Mr. Safir at deposition, he did visit Kohlmeier in the latter's office in Washington, D.C., and offered to help Kohlmeier pursue the matter [Id. at 244]. Mr. Safir stated that at the meeting Kohlmeier was unresponsive and acted as if he wished he had never talked to Mr. Safir in the first place. [Id. at 244]. Mr. Safir apparently pursued the matter no further until he raised it in his suit now the subject of this appeal. [Id. at 245-46]

At argument the District Court deferred decision on the discovery request.^{15/} Mr. Safir now argues that his inability to pursue that discovery taints the decision dismissing his complaint. He reasons that his discovery would have established the massive fraud suggested in his deposition, which in turn would have provided the foundation for an argument that whatever actual possession there may have been by the United States of information respecting the false claims violations asserted by Mr. Safir, it did not amount to legal possession within the meaning of the False Claims Act because of government officials' participation in the fraud.

There are a number of answers to this argument, including

^{15/} On its December 20, 1977 decision, here on review, the District Court characterized the information sought to be discovered as "neither germane to the False Claims Act nor to the Government's claim under 46 U.S.C. §1227, nor is it material that was not in the possession of the Government since it professedly came from 'leaks' from the Watergate Special Prosecutor's Office." [A 128, 141]

^{16/} Nowhere in the complaint is there alleged the corrupt agreement to obstruct justice that was suggested on deposition.

the lack of relevance of the proposed discovery to the claims stated in the complaint in E.D.N.Y. 77-C-1093;^{16/} the unsubstantiated nature of the claims, which are wholly inadequate to justify the discovery;^{17/} and the fact, as noted by the District Court [A 128, 141], that if the story recounted by Mr. Safir at deposition were to be credited it would in itself vitiate district court jurisdiction since the story was alleged to have had its origins in a leak from the Special Prosecutor's Office, and in result was already in the possession of the United States.

We need not address these arguments at length, however, because one additional answer to Mr. Safir's claim is clear and dispositive. As noted above, supra, p. 22, on April 26, 1977 Mr. Safir filed a petition in the United States Supreme Court for a writ of certiorari to the District of Columbia Circuit in the Safir v. Kreps litigation. A copy of that petition was served upon the

17/ See, e.g., Chung Wing Ping v. Kennedy, 294 F.2d 735 (C.A.D.C. 1961), cert. denied, 368 U.S. 938 (1961). Three alien seamen facing deportation filed an action to order the Attorney General to grant them discretionary relief. They alleged that they "believed" (294 F.2d at 736; emphasis added by the court) that relief had been denied them on the basis of an illegal conspiracy between the State Department and the Immigration and Naturalization Service, and they sought to initiate discovery proceedings against certain government officials to substantiate their claim. The district court refused to allow the discovery and the court of appeals affirmed, noting (Id. at 737) that the complaint recited "no facts giving rise to any inference of such an agreement" and that the plaintiffs had been tardy in seeking the discovery in the first place. The court of appeals concluded (ibid.):

"Assuming that the taking of the testimony of the Government officials under the circumstances here was proper -- a matter of considerable doubt -- certainly they should not have been compelled to submit to a fishing expedition based on an unsupported and nebulous allegation of criminal conspiracy."

United States Attorney General. By Mr. Safir's own concession, see supra p. 21, that petition with its appendices comprise "substantially all of the pertinent evidence and information material to the effective prosecution" of the suit stated in the complaint in E.D.N.Y. 77-C-1093. In April, 1977, when Mr. Safir's petition for a writ of certiorari was filed, Mr. Nixon had long since resigned his presidency and a new administration -- untainted by the alleged conspiracy entered into by Mr. Nixon and his administration in 1969 -- was in office. Whatever arguments may be made as to earlier periods, there can be no dispute that as of April 26, 1977 the United States had in its possession in both an actual and legal sense all pertinent evidence as to Mr. Safir's False Claims Act suit. As Mr. Safir's complaint was not filed until May 25, 1977, one month later, the jurisdictional bar of 31 U.S.C. §232(C) applies even accepting as true Mr. Safir's fanciful claims of conspiracy.

III. PLAINTIFF'S ACTION IN 77-C-1093 IS BARRED AS TO THE NON-TRADE LINES BY LIMITATIONS

All actions brought under to the False Claims Act must be filed within six years from the commission of the act alleged to be unlawful. 31 U.S.C. §235 states:

"Every such suit shall be commenced within six years from the commission of the act, and not afterward." (Emphasis added.)

This statute of limitations has been part of the False Claims Act since enactment in 1863 and is jurisdictional. As stated in United States ex rel. Nitkey v. Dawes, 151 F.2d 639, 644 (7th Cir. 1945), cert. denied, 327 U.S. 788 (1946):

"We are dealing with a special statute relative only to qui tam actions, and it carries its own jurisdictional requirement that action be brought within six years.

The language is plain and unambiguous and we think it should be strictly construed [I]t involves jurisdiction of the subject matter, and that cannot be acquired even by consent, in opposition to the statute."

The statute applies to suits brought by private informers as well as the Government. United States v. Borin, 209 F.2d 145, 147 (5th Cir. 1954), cert. denied, 348 U.S. 821 (1954).

The District Court did not reach the issue of limitations, in light of its dismissal of Mr. Safir's 1977 complaint in E.D.N.Y. 77-C-1093 on other jurisdictional grounds. However, the issue was argued to the court and the undisputed facts clearly establish that limitations form a bar to Mr. Safir's 1977 action at least as to the non-trade lines, thus providing an additional ground^{18/} in support of the District Court judgment as to those lines.

1. Limitations Runs From the Filing of the Claim. During 114 years of enforcement, numerous courts have been required to identify the date of "the commission of the act" for purposes of calculating the limitations period under Section 235. The over-

^{18/} It is of course open to this Court to consider additional grounds in support of the District Court judgment. See Jaffke v. Dunham, 352 U.S. 280, 281 (1957), ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record.")

whelming majority of those courts^{19/} has held the date from which the limitations period is to be computed is, at the latest, the date of the submission of the allegedly false claim to the Government. See, e.g., Jankowitz v. United States, 533 F.2d 538, 547 (Ct. Cl. 1976); United States v. Ekelman & Associates, Inc., 532 F.2d 545, 552 (6th Cir. 1976); United States v. Ueber, 299 F.2d

19/ Two Western District of Pennsylvania cases hold that the limitations period should be calculated from the date of the final payment on a claim, rather than from the date of the submission of the claim. United States ex rel. Vance v. Westinghouse Electric Corp., 363 F.Supp. 1038 (W.D. Pa. 1973); United States v. Klein, 230 F. Supp. 426 (W.D. Pa. 1964), aff'd, 356 F.2d 983 (3d Cir. 1966). These two cases are unique and represent a minority viewpoint which should be rejected by this Court. The Vance court relies exclusively on Klein as authority for its holding. The Klein court explains its holding in a lengthy opinion, but cites no direct authorities. Both decisions are based on the premise that "there are no false claims until the government makes payment." 363 F. Supp. at 1045, a premise which has been overwhelmingly rejected by other courts. United States v. Ridglea State Bank, 357 F.2d 495, 497 (5th Cir. 1966) [The "trial court was mistaken in its apparent belief that no cause of action is stated under the False Claims Act if the Government has not paid money on the false claim."]; United States v. Silver, 384 F. Supp. 617, 619 (E.D.N.Y. 1974), aff'd, 515 F.2d 505 (2d Cir. 1975); United States v. Cherokee Implement Co., 216 F. Supp. 374, 375 (N.D. Iowa 1963); United States ex rel. Marcus v. Hess, 41 F. Supp. 197, 218 (W.D. Pa. 1941), aff'd, 317 U.S. 537 (1943).

Before the District Court Mr. Safir argued, in reliance on United States v. Silver, supra, and Skolnick v. United States, 331 F.2d. 598 (1st. Cir. 1964), that limitations run neither from the time of the filing of the claim nor from the time of payment by the United States, but rather from the time the United States check in payment on the claim is negotiated. Those cases, however, addressed solely the question of whether there was a substantive violation of the statute itself. Silver held that a defendant who had cashed Treasury checks by forging the signature of the bank-payee should be deemed by the fraudulent endorsement to have been guilty of filing a false claim. Similarly, in Skolnick, the court found a substantive violation of the act where defendant cashed checks which he knew had been issued to his company by mistake. Neither case involved interpretation of the limitation provision of the statute and both are therefore irrelevant to the present issue.

310 (6th Cir. 1962); Smith v. United States, 287 F.2d 299 (5th Cir. 1961); United States v. Borin, 209 F.2d 145 (5th Cir. 1954); United States ex rel. Nitkey v. Dawes, 151 F.2d 639 (7th Cir. 1945); United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1960); United States v. Armour & Co., 146 F. Supp. 546 (D. D.C. 1956), aff'd., 254 F.2d 90 (D.C. Cir. 1958).^{20/}

United States v. Borin, 209 F.2d 145 (5th Cir. 1954), involved a factual situation similar to that presented by the instant litigation, in that the defendant was alleged to have submitted false claims to the Government for subsidy payments. The defendant operated a slaughterhouse. He became eligible under the Emergency Price Control Act of 1942 for government subsidy payments, which were designed to encourage the production of livestock for slaughter during a period when low ceiling prices were fixed by meat price

^{20/} Where the defendant submits the claim directly to the Government, as in the instant litigation, the statute of limitations begins to run on the date of the submission of the claim. Where an intermediary, such as a bank, submits the claim to the Government and the defendant's act either causes or aids the submission of the claim, there is some disagreement as to when the statute of limitations begins to run. Some courts have held that the submission of the claim by the intermediary starts the running of the statute. United States v. Ekelman & Associates, Inc., 532 F.2d 545, 552 (6th Cir. 1976); United States v. Ueber, 299 F.2d 310 (6th Cir. 1962). At least one court has held that the statute begins to run earlier, on the date of the last act of the defendant causing or aiding the submission of the claim. United States v. Goldberg, 256 F. Supp. 540, 542 (D. Mass. 1966). In Jankowitz v. United States, 533 F.2d 538, 547 (Ct. Cl. 1976), the court avoided a definitive ruling:

"At the earliest, we think the Government's claim accrued at the time of the obligor's [defendant's] default We leave for another day the question of whether the cause of action accrues upon default or upon later filing of the application for insurance benefits."

regulations of the Office of Price Administration ("OPA"). Compliance with the regulations of OPA was an express condition precedent to obtaining the payments. In each claim filed by the defendant, he certified that he had not willfully violated any regulation of OPA. Defendant's last claim was filed for the period through June 30, 1946. Filing its complaint more than six years after the filing of defendant's last claim, the Government charged that each certification and claim was fraudulent because the defendant obtained payment for his beef products in excess of the maximum prices. The Government also alleged that in reliance upon the defendant's certifications, "the subsidy agency paid the defendant's claims." 209 F.2d at 146. Affirming the lower court's dismissal of the Government's charges, the court held that "[a]ll of the claims here involved were filed more than six years before the suit was commenced." 209 F.2d at 147.

See too Smith v. United States, 287 F.2d 299 (5th Cir. 1961), and United States v. Armour & Co., 146 F. Supp. 546, 551 (D. D.C. 1956), aff'd., 254 F.2d 90 (D.C. Cir. 1958), which also involved, as in the instant litigation, claims submitted directly to the Government by the defendant and which held that the date of the filing of the claim against the Government fixed the date upon which the cause of action accrued and the statute began to run. As the court explained in the Smith case:

"The six-year period is to be computed from the time of 'the commission of the act,' 31 U.S.C.A. §235. The 'act' in question is the filing of the false claim." 287 F.2d at 304.

2. All Claims Were Filed More Than Six Years Prior to

Suit. It is clear, on the basis of the explicit wording of Section 235 and the foregoing case authority, that Mr. Safir's 1977 action, E.D.N.Y. 77-C-1093, is time barred and must be dismissed on that ground.

The rate reductions which form the basis of this now 12 year old litigation occurred in 1965 and 1966, and the subsidy claims which Mr. Safir charges as violating the False Claims Act were those which led to the payment of subsidies accruing to the operators during calendar years 1965 and 1966. [See A 162, 165-66] In support of their motion for summary judgment before the District Court the non-trade lines submitted affidavits by the financial officers of each of the companies identifying the dates on which the final claims for subsidy for those two years, in the form of final subsidy vouchers, were submitted to the United States. Those affidavits establish that the final subsidy claims for the ^{21/}two years were filed as follows:

	<u>Date 1965 Final</u> <u>Voucher Submitted</u>	<u>Date 1966 Final</u> <u>Voucher Submitted</u>
American President Lines	Jan. 6, 1971	Jan. 11, 1971
Farrell Lines	May 29, 1970	Oct. 1, 1970
Prudential Lines,	Feb. 26, 1971	Mar. 15, 1971
PSS Steamship Company	Jan. 27, 1971	Feb. 9, 1971

^{21/} The lines, as the subsidized industry as a whole, have, since the identified dates, been in litigation with the United States in the United States Court of Claims over issues of subsidy entitlement wholly unrelated to those pending before this Court covering a number of years, including the years 1965 and 1966.

The sworn assertions of the affidavits were repeated in the Statement of Material Facts supporting the non-trade lines' motion for summary judgment [A 322, 330], were never controverted before the District Court by Mr. Safir, and must be deemed admitted for purpose of the present litigation.^{22/}

Mr. Safir's complaint in E.D.N.Y. 77-C-1093 was filed on May 25, 1977. [See A 126] That date was more than six years after the final subsidy-claims for the years 1965 and 1966 were submitted to the United States by the non-trade lines. This Court, in result, should find the action time-barred as to those lines.

IV. THE NON-TRADE LINES' CLAIMS FOR SUBSIDY CANNOT BE FOUND TO BE FALSE CLAIMS

The underlying theory of both the complaint in E.D.N.Y. 77-C-1093 and the proposed amended complaint in E.D.N.Y. 68-C-643 is that in claiming and receiving subsidy applicable to the period during which the AGAFBO reduced rates were in effect and found in violation of Section 810 by the Board, the subsidized lines were

22/ Local Rule 9(g) of the District Court requires the submission of a statement of material fact with summary judgment motions and provides:

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

See too Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494, 495 (2d Cir. 1962); Painton & Co. v. Bourns, Inc., 442 F.2d 216, 233 N.16 (2d Cir. 1971)

defrauding the United States within the meaning of the False Claims Act. That statute, in relevant part, provides (31 U.S.C. §231):

"Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act"

It will be seen by reference to the terms of the statute that the commission of a conscious fraud against the United States is essential to the violation. The statute thus in terms provides that it is only where one submits a claim "knowing such claim to be false, fictitious or fraudulent," or where one submits, a "false bill, receipt, voucher . . . , knowing the same to contain any fraudulent or fictitious statement or entry" that the conduct becomes subject to the extraordinary penal terms of the provision. This has been the consistent view of the courts which have passed on the measure. This Court, for example, in a per curiam decision of Judges L. Hand, Augustus Hand and Clark, thus characterized the statute, United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545, 546 (2d Cir. 1942), aff'd., 320 U.S.

711 (1943):

"[T]he statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives, 'false,' 'fictitious' and 'fraudulent.' Therefore, . . . deceit is a sine qua non"

So too the Sixth Circuit, on review of the decisions under the statute, stated the conclusion, United States v. Ekelman & Associates, Inc., 532 F.2d 545, 548 (6th Cir. 1976):

"In a case under the False Claims Act, the 'gravamen' of the action is 'intentional fraud and misrepresentation' which the government is required to establish by 'clear, unequivocal, and convincing evidence.' United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962) [T]he law of this Circuit requires a showing of actual knowledge to establish liability under the False Claims Act. This appears to be the preponderant view."

Again in Woodbury v. United States, 232 F. Supp. 49, 54 (D. Oregon 1964), modified in other respects, 359 F.2d 370 (9th Cir. 1966):

"In an action under the False Claims Act, the United States must prove that there was a false representation of a material fact made with knowledge of its falsity, which false representation must be believed and acted upon by the United States. . . . The proof by the Government must be by clear, explicit and unequivocal evidence."

The facts respecting the operators' actions are fully known and are undisputed. They have been spread on the record in innumerable proceedings in the continuous litigation over that conduct which has been in progress since 1965. There is no conceivable basis on which a claim of conscious fraud against the United States can be established in those actions ^{22/} -- and most

22/ We have previously addressed, supra p. 24, Mr. Safir's fanciful and wholly undocumented charge of a \$7,000.000 bribe to former President Nixon. For reasons indicated that charge can not be entertained in this litigation.

particularly in the actions of the non-trade lines -- and in result no conceivable basis on which a violation of the False Claims Act by the non-trade lines can be grounded. We demonstrate this indisputable conclusion below -- following two independent and alternative paths -- thus providing still an additional ground to support the District Court's determination.

A. The Non-Trade Lines Were Not Parties To The
Illegal Rate Reduction And Have Been Found
Entitled To Their Full Subsidy.

It has been the position of the non-trade lines throughout this lengthy dispute that they have been free of misconduct, and their claim has for all practical purposes been upheld by all government authorities which have passed on the issue. As the non-trade lines have committed no substantive wrong, and have been determined fully entitled to their subsidies, it may not be said that their claim to that subsidy is false.

1. The Initial Evaluation of the Department of Justice.

The basic dispute, of course, arose from rate reductions put into effect by AGAFBO in 1965 in the trade between United States Atlantic and Gulf ports and ports in the United Kingdom/Bordeaux-Hamburg range in Europe. Those rate reductions were the subject of extensive investigation by the Federal Maritime Commission in Doc-^{23/}ket 65-13, and were determined to be unjustly discriminatory and unfair to Sapphire Steamship Lines and in violation of Section 15 of the Shipping Act, 1916. Following the Commission's decision the

^{23/} Rates on U.S. Government Cargo, 11 FMC 263 (1967).

Department of Justice took action to collect civil penalties under Section 15 from those AGAFBO members which served the United Kingdom/Bordeaux-Hamburg range. No penalty was sought or collected from the non-trade lines, the Department of Justice explaining that civil penalties had been sought only from the "culpable" ^{24/} AGAFBO members.

2. Safir v. Gibson. The finding of the Commission that the AGAFBO rate reductions were unjustly discriminatory to Sapphire was found by this Court, in its second opinion in Safir v. Gibson, 432 F.2d 137 (1971), to have res judicata effect under Section 810 of the Merchant Marine Act for purposes of the then-pending Board proceeding under that provision, MSB Docket S-243. Following that decision the non-trade lines sought rehearing, on the ground that they did not compete with Sapphire or serve the trades in which the reduced rates applied, and had no responsibility for the rate reductions. This Court assured the non-trade lines as follows, 432 F.2d 137 at 146:

"Four intervenors, American President Lines, Ltd. Prudential Steamship Co., Inc., Prudential-Grace Lines, Inc., and Farrell Lines, Inc., urge that they were not competing with Sapphire, had no interest in the rates which the FMC condemned and never voted on these. We see no reason for the concern felt by these carriers. We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the Maritime Administration; we said nothing about who was responsible for these and, by a footnote 2, emphasized

^{24/} See Investigation of Alleged Section 810 Violation, 12 SRR 1105 at 1113 (Rec. Dec. 1972)

that 'Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action'"

3. The Recommended Decision. In October 1969, the Maritime Subsidy Board, pursuant to the mandate of this Court, initiated its MSB Docket S-243 investigation into the violations of Section 810 claimed by Mr. Safir. Mr. Safir, as well as all subsidized AGAFBO carriers, were named parties. A lengthy hearing was conducted before the Board's Chief Administrative Law Judge, and in the hearing the non-trade lines proved their lack of complicity in the rate reductions which were central to the proceeding, and the Administrative Law Judge in his recommended decision served April 24, 1972, upheld the claims of the non-trade lines. Thus, while the Administrative Law Judge found Section 810 to have been violated by the trade lines he explicitly found the non-trade lines not to have participated in the illegal rate conduct and thus not to have violated §810.^{25/} Investigation of Alleged Section 810 Violation, 12 SRR 1105, 1108 (Rec. Dec. 1972). He further found, in result, that there was no basis on which to require a subsidy refund from the non-trade lines. Id. at 1153, 1155.

4. The Board Decision. The Board's Opinion and Order on exceptions from the Recommended Decision was issued April 16,

^{25/} The Chief Administrative Law Judge, in his "Findings and Conclusions," thus stated (12 SRR at 1108):

"The so-called Non-Trade Carriers, Farrell, Prudential, Grace and APL not having overtly participated in the conspiracy against Sapphire are found not to have violated Section 810."

1973. The Board affirmed the violation by the trade lines. With respect to the non-trade lines the Board also affirmed the findings of its Chief Administrative Law Judge that the lines had not participated in the illegal rate conduct. While the Board, unlike the Administrative Law Judge, found a "technical" violation of Section 810 by the non-trade lines, this was solely because the lines had been members of AGAFBO at the time of the rate reductions. The Board emphasized that the non-trade lines' violation of Section 810 was "technical" only and did not justify the recovery of subsidies. It explained (Investigation of Alleged Section 810 Violation, 13 SRR 809, 823 (MSB 1973)):

"Although the non-trade respondents technically violated Section 810, we are not persuaded that any sanctions are warranted. As stated hereinabove, the non-trade respondents did not, and could not under the AGAFBO agreement as implemented, vote on any of the illegal rate reductions. None of these respondents had any competitive service with Sapphire during the violation and therefore carried no cargo at the reduced AGAFBO rates. Their only connection with the condemned rate actions was as a technical party to the AGAFBO condemned rate tariffs due to their membership in AGAFBO.

"Such technical connection, while conclusive of their liability for violating Section 810, provides no basis under [the] circumstances for imposing any sanctions for violation."

The Board action as to the non-trade lines was affirmed by the Secretary of Commerce on September 4, 1974 [A 379].

5. The Sum. It thus will be seen that every government official which has passed on the issue during a decade of litigation--the Department of Justice when deciding from whom to collect civil penalties under the Shipping Act; the Maritime Administration Chief Administrative Law Judge, the Maritime Subsidy Board, and

the Secretary of Commerce when acting under Section 810--have agreed with the position of the non-trade lines that they were not parties to the illegal rate actions and that they were in result not properly subject to penalty by way of fine or reduction of subsidy. While the Board ultimately did find the non-trade lines in "technical" violation of §810, the Board's Chief Administrative Law Judge had earlier agreed with the non-trade lines that those lines were free even of a technical violation of the statute. The Board itself considered the technical violation of §810 insufficient basis to interfere with the non-trade lines' contractual right to subsidy.

Against this background of official ratification of the non-trade lines' position, it simply cannot be found that the lines committed a knowing and conscious fraud against the United States in claiming compliance with their subsidy contract and in claiming entitlement to the full subsidy authorized in those contracts.

B. All Relevant Events Were Widely
Known And Fully Disclosed.

There is, as we have earlier noted, p. 37, an alternative path to the same conclusion. It becomes apparent when one considers the history and purpose of the False Claims Act.

The False Claims Act was enacted in 1863. It had its origins in profiteering which occurred during the Civil War. The Supreme Court has explained, United States v. McNinch, 356 U.S. 595, 599 (1958), that the Act was:

"...adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent

or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."

The statute was "aimed principally at stopping the massive frauds perpetrated by large contractors," United States v. Bornstein, 423 U.S. 303, 309, (1976), and had as its chief purpose, United States ex rel. Marcus v. Hess, 317 U.S. 537, 551 (1943), "to provide for restitution to the Government of money taken from it by fraud"

The statute does not address claims against the Government which may be subject to open and honest dispute, but rather false and fraudulent claims as to which the true circumstances are concealed from the United States. Concealment, of course, is universally recognized as an essential ingredient of fraud. It thus has been stated that, Woodbury v. United States, supra, 232 F. Supp. 49 at 53, 55:

"The open, unconcealed transactions between the parties . . . would indicate that no one, at the time of the payments, was of the belief that the transaction was clouded or tainted with illegality.

* * *

"The Government cannot claim that it was defrauded by the False representations of another party where it has knowledge of the facts, prior the the payment of the claim."

Again, in United States ex rel. Nitkey v. Dawes, 151 F.2d 639 (7th Cir. 1945), the court rejected any suggestion that fraud, subject to the False Claims Act recovery, was involved in transactions between the City National Bank and the Reconstruction Finance Corporation because all relevant facts had been fully disclosed:

"[A]s early as 1932, before City National's contract was entered into, the Comptroller of the Currency

and his General Counsel, and R.F.C. had full knowledge of all the facts relating to the contract, which plaintiff now contends were subsequently concealed from them. This would seem to be a contradiction in terms. There was no concealment either of fact, or of the existence of the Illinois statute All parties to the contract and the Government had full knowledge of the facts at that time [1932]." 151 F.2d at 643.

And see to like effect United States v. Robbins, 207 F. Supp. 799, 808 (D. Kan. 1962); United States v. Schmidt, 204 F. Supp. 540, 544 (E.D. Wis. 1962).

This essential element of concealment is wholly lacking in the conduct which forms the basis of Mr. Safir's complaint in 77-C-1093 and his proposed amended complaint in 68-C-643. To the contrary, as we now demonstrate, the underlying dispute has been openly and fully ventilated in all of its ramifications from the very moment of inception.

1. 1965 Joint Economic Committee Hearings. The AGAFBO rate reductions which represent the underlying misconduct went into effect for the first time on March 29, 1965. See FMC Docket 65-13, Rates on U.S. Government Cargo, 11 FMC 263, 269 (1967). Ten days later, on April 8, 1965, Mr. Safir appeared before the Joint Economic Committee of the Congress and at that time testified fully about his conflict with AGAFBO and about AGAFBO's use of "fighting rates" in competition with Sapphire Lines. Hearings Before the Subcommittee on Federal Procurement and Regulations of the Joint Economic Committee, "Discriminatory Ocean Freight Rates and the Balance of Payments," 89th Cong., pp. 106 et seq.^{26/}

^{26/} Relevant excerpts can be found at A 385 et seq.

A representative of the Federal Maritime Commission was present at the hearing during Mr. Safir's testimony and testified that the matter had already been brought to the Commission's attention and that the agency was collecting data looking to a possible formal investigation. Id. at pp. 116-117. The Chairman of the Commission later testified to the Joint Economic Committee that the formal investigation was underway. Id. at pp. 384-385, 391-392. The Sapphire AGAFBO dispute was the subject of substantial, additional consideration at the hearings. Id. at pp. 118 et seq., 142-144, 200, 626-628, 634-635.

2. Docket 65-13. The AGAFBO rate reductions, inter alia, were made the subject of Federal Maritime Commission investigation in FMC Docket 65-13, initiated by Order of May 6, 1965.^{27/} Mr. Safir and a number of employees of Sapphire Lines, representatives of a number of AGAFBO lines, and officials of a number of governmental departments--including the Maritime Administration, the Department of Defense, the Department of State, and the General Services Administration--^{28/} testified at the hearings. The Sapphire-AGAFBO dispute in every ramification was fully explored across thousands of pages of transcript and was a major focus of the Initial Decision which issued on December 15, 1966, Rates on U.S. Government Cargo, 7 SRR 899, and of the final Commission report which issued on December 8, 1967, 11 FMC 263.

^{27/} Rates on U.S. Government Cargo, supra, N.3, 11 FMC 262 at 264.

^{28/} See A 357, 359.

3. The 1967 Demand on the Board. On December 19, 1967, seven days after the Commission had issued its decision in Docket 65-13, Mr. Safir, through his counsel, wrote the Board and Acting Maritime Administrator, with a copy to the Attorney General, demanding under Section 810 of the Merchant Marine Act that subsidy payments to the AGAFBO lines be terminated and that subsidy previously paid for the period of the AGAFBO reduced rates be recovered from the lines. [A 360] A letter to substantially the same effect was addressed by Mr. Safir's counsel to the Secretary of Commerce on January 13, 1968 [A 362] and a further demand was made to the Acting Maritime Administrator, with a copy to the Attorney General, on February 13, 1968. [A 364]

4. Safir v. Gulick. Safir v. Gulick was commenced by Mr. Safir in this Eastern District on June 24, 1968 by the filing of the complaint in 68 Civ. 643. The defendants named in that action were the Acting Maritime Administrator and the Secretary of Commerce. The issue of the AGAFBO lines' entitlement to subsidy, as this Court is fully aware, was extensively litigated in that series of proceedings.

5. Docket S-243. The Board's own investigation under Section 810, MSB Docket S-243, was initiated by Order of October 24, 1969 for the stated purpose to "compile a public record which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810 . . . has been violated and the appropriate action that should be taken." See Safir v. Gibson, 432 F.2d 137, 140 (2d Cir. 1970). An extensive hearing before the Chief Administrative Law Judge of the agency was conducted, and detailed decisions

addressed to the issue were thereafter published by the Administrative Law Judge and the Board itself. See supra, pp. 39-40.

6. 1971 Congressional Hearings. As of 1971 there was for the subsidized AGAFBO lines very sizable amounts of subsidy applicable to the years 1965 and 1966, the period of the AGAFBO rate reduction, accrued and unpaid. All Maritime Administration subsidy rates had been determined and all audits performed, but there were insufficient funds appropriated to cover payment. The Maritime Administration sought a supplemental appropriation from the Congress to cover all payments, and that request was made the subject of hearings before the Merchant Marine Subcommittee of the Senate Committee on Commerce. Hearings Before the Merchant Marine Subcommittee of the Senate Committee on Commerce on S.981, S.1220, 92d Cong., Sess. 92-26. Mr. Safir appeared to testify in opposition to the appropriation of funds to pay the accrued subsidy for the AGAFBO lines on grounds of the pendency of the Section 810 proceeding.^{29/} Id. at pp. 41-44. Inquiry as to the matter was addressed to the Maritime Administrator by the Committee, and the Maritime Administrator urged that the funds be appropriated, explaining that "these funds in my judgment are now due and payable. These companies have other sources of funds should Mr. Saffir's [sic] claim be sustained." Id. at p. 33. The funds were thereafter appropriated by the Congress. P.L. 92-607.

7. The Application For An Injunction. On June 7, 1971, Mr. Safir petitioned the District Court in E.D.N.Y. 68-C-643 for

^{29/} Relevant excerpts can be found at A 403 et seq.

an injunction restraining the Maritime Administration's payment of outstanding subsidy applicable to the years 1965 and 1966 to the AGAFBO lines on the same ground as earlier advanced to the Congress. The injunction was opposed by the Maritime Administrator and, of course, by the lines. The District Court, in the alternative, required the agency to withhold additional payments, or, if making payment, to insist that the recipient provide adequate security to assure recovery if it should be ordered by the agency. See Order of June 7, 1971.

8. Overall. This history fully demonstrates, we believe, that this is not a case where any conceivable claim of fraud or non-disclosure can be substantiated. To the contrary, from the very outset of the dispute all pertinent facts were publicly and fully disclosed in every relevant (and in several vastly irrelevant) forums. Indeed, in 1971, when the last major payment of subsidy applicable to the 1965-1966 period was made, the circumstances of payment were publicly debated--with the Maritime Administration participating fully--before a committee of Congress and before the District Court. That court refused to bar the payment where adequate security for repayment was provided. Viewed in the aggregate these circumstances render the argument that the claims were false within the meaning of the False Claims Act patently frivolous and, totally unsupportable.

CONCLUSION

For the reasons given the District Court's judgment should be affirmed.

Respectfully submitted,

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In The
United States Court of Appeals
For The Second Circuit

No. 77-6219

Marshall P. Safir,
Plaintiff-Appellant,

v.

Robert J. Blackwell, Assistant
Secretary of Commerce, et.al.,
Defendants-Appellees,

No. 77-7626

Marshall P. Safir,
Plaintiff-Appellant,

v.

American Export Lines, Inc., et al.,
Defendants-Appellees

APPENDIX TO
BRIEF FOR DEFENDANTS-APPELLEES
NON-TRADE LINE STEAMSHIP COMPANIES
AMERICAN PRESIDENT LINES, LTD., FARRELL LINES, INC.,
PRUDENTIAL LINES, INC., AND PSS STEAMSHIP COMPANY, INC.

THE SAFIR LITIGATION

The Safir litigation has assumed something of a life of its own. While this Court, of course, has had a close familiarity with the dispute at many stages, a good deal of what has transpired has been in other forums. So too, the details of multi-faceted litigation tend to merge when the dispute has been at issue, and litigated extensively, for more than a decade. We have considered in result that it may be a convenience to the Court if we were to provide, more or less as a reference tool, a relatively full summary of the history of the litigation. We do so by way of this Appendix.^{1/}

A. The Parties

1. Mr. Safir and Sapphire Steamship Lines. Mr. Marshall Safir was a fifty-percent stockholder in Sapphire Steamship Lines ("Sapphire"), a steamship company incorporated in 1965. Sapphire provided service exclusively between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range in Europe.^{2/} Mr. Safir was plaintiff in both of the actions now on appeal to this Court.

^{1/} We do not consider the essentially historical facts addressed in this Appendix to be in dispute, and thus simply refer the Court, by way of support, to the place in prior decisions at which an individual fact has previously been found. Pleadings in, or actions taken by this Court and the United States District Court for the Eastern District of New York, are identified simply by date, and will be found in the records of this Court or the District Court record on appeal. Unreported decisions or pleadings or other filings in other forums are included in the Joint Appendix and are identified by reference to that appendix as "A ____."

^{2/} See MSB Docket S-243, Investigation of Alleged Section 810 Violation, 12 SRR 1105, 1108-09, 1111 (Rec. Dec., 1972). Throughout this Appendix, where reference is made to maritime decisions which have not yet been officially reported, the citation is to Pike and Fischer Shipping Regulation Reporter, identified as "SRR."

2. AGAFBO. Atlantic and Gulf American Flag Berth Operators ("AGAFBO") was a conference of United States-flag ocean carriers, approved pursuant to §15 of the Shipping Act, 1916, 46 U.S.C. §814, and authorized to negotiate rates with the Department of Defense for ocean carriage of military cargoes between United States Atlantic and Gulf ports and all foreign ports to which military cargoes were transported. Virtually all United States-flag ocean carriers serving any of those trades were members.^{3/} The AGAFBO members were about evenly divided between subsidized carriers--those which were parties to an operating-differential subsidy agreement under Title VI of the Merchant Marine Act, 1936, 46 U.S.C. §1101 et seq.-- and non-subsidized carriers.

3. Trade Lines. Throughout this litigation the term "trade lines," most broadly, has had reference to those AGAFBO members which provided service between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range--the only trade which Sapphire served. In proceedings under §810 the term "trade lines" has had a narrower meaning, applying only to the subsidized AGAFBO carriers in that trade--American Export Lines, Bloomfield Steamship Co., Lykes Bros. Steamship Co., Moore-McCormack Lines, and United States Lines, Inc.

4. Non-trade Lines. The term "non-trade lines," during this litigation, has identified those AGAFBO members which did not

^{3/} See FMC Docket 65-13, Rates on U.S. Government Cargoes, 11 FMC 263, 264-266 (1967).

provide service between United States Atlantic and Gulf ports and ports in the United Kingdom and Bordeaux-Hamburg range, and thus did not compete with Sapphire.^{4/} In proceedings under §810 the term has identified the subsidized non-trade lines, and it will be so used here. The Maritime Subsidy Board, in the MSB Docket S-243 decision here on review, held that the non-trade lines had not voted on or carried cargo at the United Kingdom/Bordeaux-Hamburg reduced rates found in violation of §810. To the contrary "[t]heir only connection with the condemned rate actions was as a technical party to the AGAFBO condemned rate tariffs due to their membership in AGAFBO." Investigation of Alleged Section 810 Violation, 13 SRR 809, 823 (MSB, 1973).

5. Public Defendants. The public officials against which these proceedings have been brought over the past decade have included the last five Secretaries of Commerce (Secretaries Kreps, Richardson, Dent, Stans and Smith) and the last three Chairmen of the Maritime Subsidy Board (Messrs. Gulick, Gibson and Blackwell), as well as other officials of the Maritime Subsidy Board.

B. Federal Maritime Commission Docket 65-13

The pending dispute has its origins in a series of rate reductions on military cargo moving between U.S. Atlantic and Gulf ports and ports in the United Kingdom/Bordeaux-Hamburg range and were put into effect by AGAFBO in 1965. The reductions were de-

^{4/} See Investigation of Alleged Section 810 Violation, 13 SRR 809, 810 (MSB, 1973).

signed only to meet the rates of Sapphire, which had just entered that trade. The reduced AGAFBO rates were maintained for 11-months, and were terminated March 1, 1966.^{5/} Their legality was among the matters considered by the Federal Maritime Commission in its FMC Docket 65-13, Rates on U.S. Government Cargo, 11 FMC 263 (1967), an investigation "of virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes." 11 FMC at 264. The Commission also considered charges by Sapphire that a variety of additional actions alleged to have been taken by AGAFBO or its individual members to discourage the Sapphire service were in violation of the governing AGAFBO agreement, or the provisions of the Shipping Act, 1916. Id. at 280 et seq. The Commission decided (i) that "AGAFBO's rates * * * were reduced to an admittedly noncompensatory and unreasonable level in an attempt unfairly to compete with Sapphire [and] were so unreasonably low as to be detrimental to the commerce * * *"; (ii) that the rate action was in result in violation of §§15 and 18(b)(5) of the Shipping Act, 1916, 46 U.S.C. §§814, 817; and (iii) that "AGAFBO did not otherwise violate the Shipping Act." Id. at 287.

Following the Commission decision, the Department of Justice took action to collect civil penalties under §15 of the Shipping Act, 1916 from those AGAFBO members--both subsidized and unsubsidized--which served the United Kingdom/Bordeaux-Hamburg range.

^{5/} See Rates on U.S. Government Cargoes, 11 FMC 263, 269 (1967).

No penalty was sought or collected from any of the AGAFBO members which did not serve the United Kingdom/Bordeaux-Hamburg range, including, of course, the non-trade lines. The Department of Justice explained this distinction on the ground that civil penalties had been sought only from "culpable" AGAFBO members.^{6/}

C. Safir v. Gulick

Safir v. Gulick, E.D.N.Y. Civil No. 68-C-643, was an action filed by Mr. Safir in district court in June, 1968 against the Acting Maritime Administrator and the Secretary of Commerce. The complaint was filed six months after the Federal Maritime Commission (which is wholly independent of the Secretary, and administers a separate statute) had issued its Docket 65-13 decision, and after Mr. Safir, through counsel, had issued a series of demands to the Maritime Subsidy Board, Maritime Administrator and Secretary of Commerce that the subsidized AGAFBO carriers be denied all subsidies on the theory that in result of the Shipping Act violations found in Docket 65-13 it followed that those lines also had violated Section 810 of the Merchant Marine Act as well. [A 360] The complaint, reciting that it was based on §810, sought the following relief in implementation of the FMC Docket 65-13 findings that the United Kingdom/Bordeaux-Hamburg rate reductions had been unfair to Sapphire [A 62, 68]:

"A. A judicial declaration adjudicating that the making of any subsidy payment of any kind out of the funds of the United States to the carriers who

^{6/} See Investigation of Alleged Section 810 Violation, 12 SRR 1105 at 1113 (Rec. Dec., 1972).

were members of AGAFBO during the time period covered by the decision of the Maritime Commission, Docket No. 65-13, is illegal in violation of 46 U. S.C. 1227;

"B. That an order of prohibition be issued prohibiting and enjoining the defendants from continuing to make such subsidy payments;

"C. That an order be issued directing the defendants to commence appropriate legal action to recover the subsidy payments heretofore illegally made, * * *"

None of the AGAFBO carriers were made defendants in the action.

The District Court dismissed the 68-C-643 complaint on the dual grounds that Mr. Safir lacked standing to bring the action, and that the actions sought to be compelled--the prohibition of payment of subsidy for the future, and the collection of subsidy paid in the past--were within the unreviewable discretion of the Secretary. Safir v. Gulick, 297 F.Supp. 630 (E.D.N.Y. 1969). This Court reversed the dismissal, ruling that the Secretary's discretion under §810 was not unlimited and that Mr. Safir did have standing to compel the Secretary to exercise that discretion. This Court interpreted §810 (i) to require the Secretary to discontinue current payments of subsidy during a period of continued violation of §810, and (ii) to authorize the Secretary, in the exercise of his discretion, to recover subsidy paid during periods of violation which had occurred in the past. Safir v. Gibson, 417 F.2d 972 (2d Cir. 1969).

The Maritime Subsidy Board promptly initiated a proceeding, denominated MSB Docket S-243, for the stated purpose to "compile a public record 'which will provide a basis for recommending to the Maritime Subsidy Board whether Section 810 * * * has been

violated and the appropriate action that should be taken.'" See Safir v. Gibson, 432 F.2d 137, 140 (2d Cir. 1970). After the Board's Order of Investigation was issued Mr. Safir returned to the District Court, in the 68-C-643 proceeding, with the claim that the Secretary was disregarding this Court's ruling by initiating the proceeding. Mr. Safir's demand was that the Secretary be enjoined from making any further payments of subsidy to the subsidized AGAFBO lines. The injunction was denied, and that ruling was affirmed by the Court on review. Id.

When the case came before it this second time, this Court also undertook to analyze the legal significance of the Commission's Docket 65-13 findings in the pending Docket S-243 proceeding, and ruled that the Commission findings that the AGAFBO rates were unreasonably low and unfair to Sapphire compelled, on principles of collateral estoppel, that the Secretary also find that the rates were "unjustly discriminatory and unfair" to Sapphire within the meaning of §810. Speaking through Judge Friendly, this Court nevertheless emphasized that:

"Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom." 432 F.2d 137 at 145, n. 2.

It reiterated this latter position when denying petitions for rehearing filed by the trade and non-trade carriers, which had been granted leave to intervene in the suit following this Court's decision. Id. at 146.

Mr. Safir sought Supreme Court review by writ of certio-

rari. This was denied, as was a conditional cross-petition filed by the carriers. 400 U.S. 850, 942 (1970).

The District Court on September 17, 1970, issued its judgment implementing the mandate of this Court.

D. MSB Docket S-243

As noted, p. 6, supra, the Maritime Subsidy Board began its Docket S-243 investigation in October, 1969. Mr. Safir, as well as all subsidized AGAFBO carriers, were named parties. A lengthy hearing was conducted before the Board's Chief Administrative Law Judge who, in a Recommended Decision served April 24, 1972, found all of the trade respondents--those serving the United Kingdom/Bordeaux-Hamburg range in which Sapphire operated--to have violated §810 during the 11-month period in 1965-1966 when reduced rates were maintained in the United Kingdom/Bordeaux-Hamburg range. The Chief Administrative Law Judge, in contrast, found the non-trade lines not to have participated in the illegal rate conduct, and thus not to have violated §810.^{7/} Investigation of Alleged Section 810 Violation, 12 SRR 1105, 1108 (Rec. Dec. 1972).

The Board's Opinion and Order on exceptions from the Re-

^{7/} The Chief Administrative Law Judge in his "Findings and Conclusions," thus stated [12 SRR at 1108]:

"The so-called non-trade carriers, Farrell, Prudential, Grace and APL not having overtly participated in the conspiracy against Sapphire are found not to have violated Section 810."

He recommended, in result, "that no sanction be imposed against these carriers." Id. at 1153, 1155.

commended Decision was issued April 16, 1973. The opinion affirmed the finding of violation by the trade lines and, subject to audit and verification, assessed a recovery of subsidy against them which, in aggregate, totaled slightly less than \$2.4 million. This assessment was substantially less than the subsidy paid to the lines for that 11-month period of the violation and, for each individual line, was based on an appraisal of the nature of that line's participation in the illegal activity as well as of other mitigating factors of record. With respect to the non-trade lines, the Board affirmed its Chief Administrative Law Judge's findings that these lines had not participated in the illegal rate conduct. The Board found the non-trade lines in "technical" violation of §810 solely because they had been members of AGAFBO at the time of the rate reductions, but it emphasized that their violation was "technical" only and did not justify or require the recovery of subsidies. Investigation of Alleged Section 810 Violation, 13 SRR 809, 823 (MSB 1973).^{8/}

The Board's April 16, 1973, Opinion and Order was made

8/ The Board said [13 SRR at 823]:

"Although the non-trade respondents technically violated Section 810, we are not persuaded that any sanctions are warranted. As stated hereinabove, the non-trade respondents did not, and could not under the AGAFBO agreement as implemented, vote on any of the illegal rate reductions. None of these respondents had any competitive service with Sapphire during the violation and therefore carried no cargo at the reduced AGAFBO rates. Their only connection with the condemned rate actions was as a technical party to the AGAFBO condemned rate tariffs due to their membership in AGAFBO.

"Such technical connection, while conclusive of their liability for violating Section 810, provides no basis under [the] circumstances for imposing any sanctions for such violation."

final by action of October 15, 1973. 14 SRR 77. Petitions for review of the Board decision were filed by the lines with the Secretary of Commerce pursuant to Department of Commerce Order 10-8, 46 C.F.R. Part 202. The Secretary reduced by about one-half the recovery ordered from the trade lines, and declined to disturb the Board determinations insofar as they affected the non-trade lines. Order of September 4, 1976 [A 379].

The Board decision in Docket S-243 was thereafter made the subject of an action by Mr. Safir in the United States District Court for the District of Columbia, Safir v. Dent, D.C.D.C. No. 74-1474. The then Secretary of Commerce, Frederick Dent, was the defendant, and the carrier parties to Docket S-243 were permitted to intervene.^{9/} It was Mr. Safir's claim in that action that the Board/Secretary were wholly without discretion to mitigate the penalties under Section 810, and Mr. Safir sought an order under Section 810 compelling recovery of all subsidy paid to all of the subsidized AGAFBO carriers applicable to the eleven-month period of the AGAFBO reduced order. The District Court dismissed the action by order of October 21, 1975. [A 384] On appeal the United States Court of Appeals for the District of Columbia Circuit rejected Mr. Safir's claim that Section 810 established an absolute prohibition of the payment of subsidy for periods of past violation, and affirmed the Secretary's discretion to establish the

^{9/} After Mr. Safir had filed his action the carriers filed their own suits claiming that Section 810 had not been violated. American Export Lines v. Dent, D.C.D.C. No. 74-4768; American President Lines v. Dent, D.C.D.C. No. 75-0077.

amount, if any, of subsidy recovery to require for a past violation of that provision. The Court of Appeals remanded the action to the District Court, however, for an evaluation of whether the Secretary had properly exercised that discretion. Safir v. Kreps, 551 F.2d 447 (D.C. Cir. 1977). A petition for a Writ of Certiorari to the United States Supreme Court filed by Mr. Safir, as well as conditional cross-petitions filed by the United States and the lines, were denied on October 3, 1977. 46 U.S. L.W. 3208.

E. Additional Litigation by Mr. Safir To Enjoin Payment of Subsidy or For Interlocutory Review of Docket S-243.

In addition to the proceedings already identified, Mr. Safir, on five separate occasions during the pendency of Docket S-243, moved either in the Eastern District, directly in this Court, or in the United States District Court for the District of Columbia to have continued payment of operating-differential subsidy to the trade and non-trade lines enjoined, or to have review on an interlocutory basis of the decision of the Maritime Subsidy Board that it would not require recovery from the lines of the entire subsidy paid to them for the 11-month period of the United Kingdom/Bordeaux-Hamburg rate reductions.^{10/}

1. In the Eastern District of New York. Three of the proceedings were brought in the Eastern District under the caption 68-C-643. An application filed with that court on June 7, 1971,

^{10/} Since final decision in Docket S-243 Mr. Safir has sought additional interlocutory judicial intervention in the affairs of the operators, most recently by seeking to enjoin the sale of the stock of American Export Lines by the trustee of its bankrupt parent.

sought an injunction barring the Secretary from disbursing subsidy to the trade and non-trade lines out of funds which had been made available by the Congress in a supplemental appropriations bill, P.L. 92-18, designed to liquidate a large accrued subsidy liability to the subsidized lines. Applications filed with the District Court on May 4 and 6, 1972, sought an order requiring that certain of the subsidized AGAFBO lines which had been authorized by special legislation to sell passenger ships to foreign owners, P.L. 92-296, be required to escrow the proceeds of sale as security for payment of \$810 penalties pending conclusion of Docket S-243. An application filed with the court on April 5, 1974, again sought to enjoin the Secretary from disbursing appropriated subsidy funds to the trade or non-trade lines. Each of these applications was denied, and when on two occasions Mr. Safir appealed, the denials were affirmed by this Court. See Order of June 22, 1971, 330 F.Supp. 225 (E.D.N.Y. 1971); Order of June 6, 1972, affirmed 469 F.2d 1061 (2d Cir. 1972); Order of April 30, 1974, affirmed June 4, 1974 (2d Cir.). A single limited exception is found in the June 22, 1971 order which did require the Secretary, in the alternative, to withhold any additional payments of subsidy applicable to the operative 11-month period in 1965-1966, or to obtain sufficient security for recovery of such additional payments until the Secretary had made his underlying determination of whether to recover subsidy for that period. 330 F.Supp. 225 (E.D.N.Y. 1971). That injunction was dissolved by order of October 17, 1974, following the Secretary's final decision in Docket S-243, on ground that "[t]he required informed decision of record

has now been made."

2. This Court. In April of 1973, after the Board had issued its Opinion and Order, but before the Board had issued its supplemental and final order, Mr. Safir "moved" directly in this Court for an order reversing and setting aside the Board action insofar as it failed to require recovery of all subsidies accruing to the trade and non-trade lines for the 11-month period of the United Kingdom/Bordeaux-Hamburg rate reductions. The motion was grounded on the claim that §810 imposed an absolute obligation on the Secretary to recover those subsidies. [A 370 et seq.] This motion was denied without opinion [A 378], and a petition to the Supreme Court for a writ of certiorari was also denied. 414 U.S. 975 (1973).

3. In The District of Columbia. Finally, following the Board's final opinion, but while the proceeding was pending on review before the Secretary of Commerce, Mr. Safir filed an action to review the Board decision in the United States District Court for the District of Columbia. D.C.D.C. Civ. Number 2156-73. That complaint was dismissed as premature by Judge Corcoran [A 383], and Mr. Safir's appeal from Judge Corcoran's order was dismissed by the United States Court of Appeals for the District of Columbia Circuit on February 18, 1975.

F. The Pending Actions

We come then, down this long and tortuous path, to the pending actions.

77-C-1093 is an action filed on May 26, 1977, by Mr. Safir "On Behalf of the United States of America" against the

individual subsidized AGAFBO carriers. The action, which is grounded on the False Claims Act, 31 U.S.C. 231, et seq. asserts that the defendants have defrauded the United States by claiming subsidy applicable to the 11-month period during which a violation of Section 810 has been determined in Docket S-243. A refund of all subsidy for the period, together with statutory penalties, is sought. [A 162 et seq.] A notice of pendency of the action was issued to the United States [A 170], which on June 21, 1977 declined to enter the suit. [A 172]

In 68-C-643 Mr. Safir on September 17, 1977 has moved to amend his original 1968 complaint in that action to charge the subsidized AGAFBO carriers, albeit in considerably more detail, with the same False Claims Act violation alleged in 77-C-1093. [A 43 et seq.] As Mr. Safir himself makes clear [A 35, 39-40], his purpose in attempting to amend his complaint in 68-C-643 to state a claim under the False Claims Act, having only three months earlier filed a new and separate suit on the same claim, is to have this new claim relate back some ten years to the date of the original complaint in the 1968 action.

The cases were heard by the District Court on Mr. Safir's motion to amend in 68-C-643 and on defendants' opposition and motion for summary judgment in 77-C-1093 and resulted in the District Court's memorandum and order of December 20, 1977, now on appeal, refusing amendment in 68-C-643 and dismissing the complaint in 77-C-1093.

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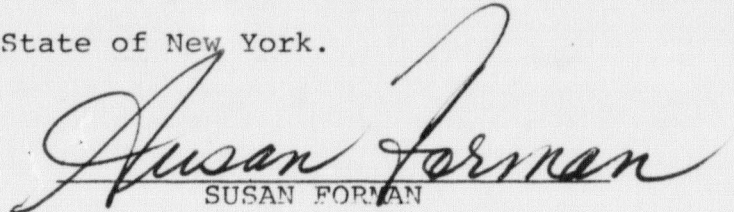
Docket No. 77-7626

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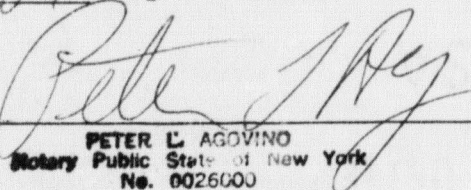
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by depositing a true copy of same enclosed in a postpaid
properly addressed wrapper, in an official depository under
the exclusive care and custody of the United States Post
Office Department within the State of New York.


SUSAN FORMAN

Sworn to before me this
29 day of March, 1978.


PETER L. AGOVINO
Notary Public State of New York
No. 0026000

Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1979

